89- 1515

No. 89 --

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

RUTH RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JOHNNY SPAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether reversal of a conviction on grounds unrelated to factual innocence precludes consideration of the underlying facts by a parole board in determining suitability for parole on another conviction. *Cf. Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668 (1990).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 8, 1989.

OPINIONS BELOW

The order of the Court of Appeals is unreported. A copy of the order is attached to this petition as Appendix A. The order of the District Court for the Northern District of California is unreported. A copy of the order is attached to this petition as Appendix B.

This case was before this Court once before. *Rushen v. Spain*, 464 U.S. 114 (1983).

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on December 8, 1989. Rehearing was denied on February 2, 1990. (App. C.) This petition for writ of certiorari followed within 90 days. 28 U.S.C. section 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, United States Code section 2243 provides in pertinent part:

"The Court shall summarily hear and determine the facts [of an application for writ of habeas corpus], and dispose of the matter as law and justice require."

STATEMENT OF THE CASE

On September 22, 1986, the District Court for the Northern District of California granted a writ of habeas corpus, finding that respondent was improperly shackled during his state trial, and ordered the State of California to retry him within 90 days or release him from custody with respect to the convictions at issue.[1/] Respondent did not contend, and the District Court did not find, that he was innocent of the two murders of which he was convicted. Petitioner filed a notice of appeal on September 25, 1986 (ER 31),[2/] and moved for stay

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1. The unreported order was affirmed, 2-1, by the Court of Appeals for the Ninth Circuit on August 22, 1989 in No. 86-2687. *Spain v. Rushen*, 883 F.2d 712 (9th Cir. 1989). A petition for writ of certiorari is pending in that case. *Rushen v. Spain*, No. 89 -1336.

2. "ER" refers to the Excerpt of Record filed in the Court of Appeals in this case, No. 88-1784.

pending appeal on September 30, 1986. (ER 33-37.) The stay was granted on October 31, 1986. (ER 39-41.)

On December 22, 1986, respondent moved for bail pending appeal. (ER 43-46.) Petitioner responded to the motion on December 31, 1986. (ER 48-50.) On March 23, 1987, the District Court denied the motion for bail pending appeal and also ordered, *sua sponte,* that the California Board of Prison Terms (hereinafter "Board" or "BPT") not consider the overturned 1976 convictions "and related incidents" in determining respondent's eligibility for parole. (ER 52-54.)

After the Board of Prison Terms denied parole to respondent on December 18, 1987, the District Court, on February 4, 1988, ruled that the Board had violated the court's order of March 23, 1987, and ordered that a new parole hearing be held within 10 days. (ER 90-92.)

On February 11, 1988, a three-member panel of the Board of Prison Terms set a parole date of May 5, 1990, for respondent. (ER 93-136.) Respondent challenged this parole date by application for writ of habeas corpus in state court. On March 8, 1988, the Los Angeles County Superior Court ordered that respondent be placed on immediate parole. (Super.Ct. No. HC 206317.)[3/] (ER 137.)

On March 9, 1988, the District Court admitted respondent to bail pending the disposition of the appeal (No. 86-2687) in the Court of Appeals. The order

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3. On November 15, 1989, the California Court of Appeal, Second District, Division Two, reversed the order of the Los Angeles Superior Court, which had granted habeas corpus relief. (B 034457, in the files of the Court of Appeal.) The Court of Appeal ruled that a new parole suitability hearing could be held. The opinion of the Court of Appeal became final on December 15, 1989. Rule 24(a), Cal. Rules of Court. To date, the parole suitability hearing has not been held.

granting the writ of habeas corpus was affirmed, and a petition for writ of certiorari is pending in this Court. (*See* n.1.)

STATEMENT OF FACTS

The District Court's order of February 4, 1988, which petitioner challenges in this case, speaks for itself. We quote from it in pertinent part:

> "Spain argues that this Court has power to grant this motion, without requiring exhaustion of state remedies, by way of enforcing our Order of March, 23 1987. That Order forbids the parole board from considering Spain's 1976 convictions or related incidents in deciding whether to grant parole.
>
> "Spain claims that the parole board violated this Order in two ways. First, it persistently inquired

about Spain's participation in 'criminal conspiracies' in 1971, apparently seeking to compel petitioner to discuss the events leading to the 1976 convictions.

"Second, the parole board weighed Spain's failure to undergo a "Category X" psychological study in making its decision. The board had ordered this study in 1986, but the study administrator refused to do it because of this Court's 'obstructionistic' order barring inquiry into the 1976 convictions. Spain was in effect blamed for not having the study done, because he would not talk about the 1976 convictions in light of our Order. Hence, the board's consideration of this as a factor in denying parole is a violation of our Order.

"On review of the transcript of the parole hearing, and the arguments of the parties, this Court concludes that, albeit indirectly, the parole board has defied our March 23, 1987 Order. Thus, this Court can invalidate the hearing without inquiring whether the parole board acted arbitrarily or lied about its reasons for denying parole. So, granting this motion is within the limited scope of our federal powers.

"Accordingly, the board must give petitioner a new hearing, in strict compliance with our order not to consider, directly or indirectly, the 1976 convictions or related incidents. That is, the board must base its decision solely on petitioner's 1967 conviction, his juvenile record, and his

conduct during incarceration apart from his involvement in those incidents.

"If the new hearing contains similarly improper and unjust grounds for denial of parole, this Court will be compelled to conclude that the board cannot provide petitioner with a lawful hearing in compliance with our March 23, 1987 Order and further relief may then be appropriate." (App. B at 2-3.)

REASONS FOR GRANTING THE WRIT

As this Court has long made clear, the "selection of an appropriate sentence" for a criminal defendant requires "the possession [by the sentencing judge] of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 247 (1949). Thus, due process countenances the receipt of evidence which would be inadmissible on the issue of guilt. *Id.*, at 250. The same necessity for reliable information is no less relevant in determining fitness for parole. A parole board must be apprised of all aspects of a prisoner's life and personality, especially his penchant for violence. Because the past is still the most reliable predictor of the future, evidence of the prisoner's prior criminal acts is essential for the assessment of his potential as a successful parolee.

The District Court ruled that respondent's overturned convictions could not be considered in determining his parole suitability. We have acknowledged, and continue to concede, that the fact of the convictions was properly prohibited from consideration by the Board of Prison Terms because those convictions were no longer constitutionally viable. *See United States v. Tucker*, 404 U.S. 443 (1972). However, we emphatically maintain that the Board could consider the underlying events which constituted the offenses and could make its own findings regarding respondent's culpability. That aspect of the District Court's order forbidding such an inquiry is unprecedented and flies in the face of this Court's command that the reliability of result must be the touchstone of due process.

This case is appropriate for the Court's consideration for two reasons. First, it is essential to vindicate the BPT's use of reliable evidence in determining fitness for parole regardless of its admissibility under the highly technical rules of evidence. Second, the District Court has consistently defied this Court's command to defer to the fact-finding processes of the State of California. In *Rushen v. Spain*, 464 U.S. 114 (1983), the District Court ignored the results of that process. In this case, the court has tampered with the very integrity of that process. We earnestly plead for redress.

ARGUMENT

THE DISTRICT COURT ERRED BY PROHIBITING THE CALIFORNIA BOARD OF PRISON TERMS FROM CONSIDERING THE UNDERLYING FACTS OF RESPONDENT'S OVERTURNED CONVICTIONS IN DETERMINING HIS SUITABILITY FOR PAROLE.

Over forty years ago, Justice Black declared that "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams v. New York*, 337 U.S. 241, 247 (1949). The same principle is no less applicable in the determination of parole suitability: "the process should be flexible enough to consider evidence, including letters, affidavits, and other material

that would not be admissible in an adversary criminal trial." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

Cases of the lower federal courts are in unanimous accord. Decisional law is crystal clear that the United States Parole Commission may consider the facts underlying a conviction in determining a prisoner's suitability for parole even if that conviction is overturned. The reversal does not preclude the Commission from making independent findings of the prisoner's culpability. Due process requires only that the prisoner be permitted to present his version of the events or other mitigating circumstances. *Mack v. McCune*, 551 F.2d 251, 253-254 (10th Cir. 1977).

"Thus, the [Commission] may consider charges dismissed as part of a plea bargain, charges unproved at trial, other unadjudicated offenses, and hearsay

allegations." *Edwards v. United States*, 574 F.2d 937, 943-944 (8th Cir. 1978); *see also Mullen v. United States Parole Commission*, 756 F.2d 74, 75 (8th Cir. 1985) (dismissal of charges does not preclude independent findings of criminal conduct); *Standlee v. Rhey*, 557 F.2d 1303 (9th Cir. 1977) (proper to revoke parole based on criminal charges on which defendent had been acquitted; different standard of proof); *Billiteri v. Board of Parole*, 541 F.2d 938 (2d Cir. 1976) (proper to rely on hearsay in presentence report); *Bistram v. Parole Board*, 535 F.2d 329 (5th Cir. 1976) (permissible to use charges dropped in plea bargain); *United States v. Chambers*, 429 F.2d 410 (3rd Cir. 1970) (acquittal does not preclude use in parole revocation hearing); 28 C.F.R. 2.21(b)(2) ("[n]ew criminal conduct may be determined either by a new . . . conviction or by an independent finding by the

Commission. . . .") California law also permits consideration of the underlying evidence in determining suitability for parole despite the reversal of a conviction or an outright acquittal. *In re Coughlin*, 16 Cal.3d 52, 57, 545 P.2d 249 (1976).

The Court very recently has affirmed the principle that an acquittal does not require that the underlying evidence be inadmissible for all purposes. In *Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668 (1990), the Court upheld the introduction in a criminal trial of evidence relating to crime that the defendant had previously been acquitted of committing. The Court explained that the prior acquittal established only the existence of reasonable doubt as to guilt. At the second trial, the evidence of similar acts was admissible if the jury could "reasonably conclude" that the defendant was the

actor, a lesser burden of proof for the Government to satisfy. *Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668, 671-673 (1990).

The relevance of the *Dowling* principle to this case is manifest. Application for parole is addressed to the sound discretion of the California Board of Prison Terms. *In re Powell*, 45 Cal.3d 894, 902, 755 P.2d 881 (1988). The reasonable doubt standard plays no role in its determination. Thus, it may consider evidence relating to a crime of which the prisoner had been acquitted. *In re Coughlin, supra.* *A fortiori* it may evaluate evidence underlying a conviction which was reversed for reasons having nothing to do with the sufficiency of the evidence.[4/]

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4. Respondent's convictions were overturned on the ground that he was improperly shackled during trial. *Spain v. Rushen, supra*, 883 F.2d 712. We stress that respondent has never claimed that evidence of his guilt is

Against this backdrop of clear and unambiguous decisional law we consider the District Court's wholly inexplicable order. *But see Spain v. Rushen, supra*, 883 F.2d at 738 (dis.opn.) In its order of March 23, 1987, the District Court prohibited the California Board of Prison Terms from considering the 1976 murder convictions of the respondent in determining his suitability for parole on the 1967 murder conviction. In clarifying and expanding its earlier order, the District Court, on February 4, 1988, forbade consideration of the 1976 convictions "or related incidents. That is, the board must base its decision solely on petitioner's 1967 conviction, his juvenile record, and his conduct during incarceration apart from his involvement in those incidents." The District Court clearly erred in prohibiting consideration by the BPT of the underlying events which resulted in the convictions.

When the District Court overturned the 1976 convictions by granting a writ of habeas corpus, it nullified the convictions but it could not rewrite history. Whether or not the convictions exist any longer, the fact remains that two prison guards were murdered in San Quentin's Adjustment Center on August 21, 1971, and petitioner contends that the BPT is entitled to determine whether respondent committed those murders in evaluating his parole suitability.

The Court of Appeals declined to reach the merits of this issue, ruling that petitioner had failed to preserve the claim for appeal. (App. A.) Nothing could be further from the truth. The Court of Appeals stated that petitioner had challenged the District Court's order which precluded the Board of Prison Terms from considering the "overturned, 1976 murder convictions;" noted that

petitioner "agreed" that "there were no constitutionally viable findings of fact" once the convictions were overturned; and concluded that petitioner had "failed to preserve this challenge for appeal." (App. A.) The error in the court's syllogism is the fallacious premise that petitioner argued that the invalidated convictions could be considered in determining suitability for parole. That is simply and incontestably untrue. In mischaracterizing the question posed, the Court of Appeals inexcusably failed to address the issue which petitioner did raise.

Petitioner "agreed," and continues to acknowledge, that the fact of a conviction, if it has been reversed, cannot be considered in determining parole suitability. *Cf. United States v. Tucker*, 404 U.S. 443 (1972). But the law explicitly and uniformly holds that a parole board may consider the facts underlying a conviction in determining

a prisoner's suitability for parole even if that conviction is overturned. The reversal does not preclude the board from making independent findings of the prisoner's culpability. That is the precise issue which petitioner raised in the Court of Appeals, the issue which the court refused to address. The question is clear-cut and so is the answer: May a parole board consider the underlying facts of an overturned conviction in determining parole suitability? The answer is "yes."

This issue is of transcendent importance because the California Board of Prison Terms regularly relies on unadjudicated criminal acts in determining fitness for parole. It must know whether evidence of such acts is admissible, and whether dismissal or acquittal of a charge, or reversal of a conviction precludes consideration of the underlying events. Finally, petitioner must add that the

District Court has consistently disregarded the fact-finding processes of this state. In *Rushen v. Spain*, 464 U.S. 114 (1983), the District Court erroneously rejected the findings of the trial court. In this case, the District Court has compromised the integrity of the vital process which determines the suitability for parole of a prisoner with a history of violence. We ask this Court to restore the integrity of that fact-finding process.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED: March 23, 1990

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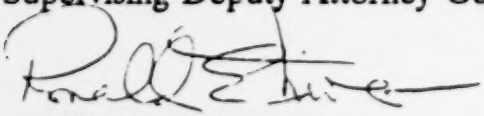

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APPENDICES

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LARRY SPAIN,

Petitioner-Appellee,

v.

RUTH RUSHEN,

Respondent-Appellant.

No. 88-1784
D.C. No.
C-81-4858-TEH

ORDER

Before: HALL, KOZINSKI and NOONAN, Circuit Judges.

Appellant Ruth Rushen challenges the district court's order entered February 4, 1988, that prevents the Board of Prison Terms from considering the overturned, 1976 murder convictions. For the first time on appeal, appellant contends that the district court erred in ordering the Board of Prison Terms to ignore this information in determining parole eligibility. Before the district court, however, appellant agreed with the court that once the convictions were overturned, "there were no constitutional viable findings of fact." E.R. at 73 (Opposition to Renewed Motion for Release Under Fed. R. App. P. 23 (c) and Request for an Evidentiary Hearing). Under

these circumstances, we conclude that appellant has failed to preserve this challenge for appeal. See United States v. Whitten, 706 F.2d 1000, 1012 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

Affirmed.

FILED: December 8, 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHNNY LARRY SPAIN,

Petitioner,

v.

RUTH RUSHEN, JESS MARQUEZ,

Respondents.

No. C 81 4858 TEH

ORDER

This matter comes before the Court on petitioner's motion for release under Rule 23(c) of the Federal Rules of Appellate Procedure, on the grounds that the California Board of Prison Terms acted unlawfully in the December 18, 1987, hearing at which it denied parole. Petitioner's reply brief reformulates the relief requested; he now requests a new, valid hearing within ten days, or release.

Spain argues that this Court has power to grant this motion, without requiring exhaustion of state remedies, by way of enforcing our Order of March 23, 1987. That Order forbids the parole board from considering Spain's 1976 convictions or related incidents in deciding whether to grant parole.

Spain claims that the parole board violated this Order in two ways. First, it persistently inquired about Spain's participation in "criminal conspiracies" in 1971, apparently seeking to compel petitioner to discuss the events leading to the 1976 convictions.

Second, the parole board weighed Spain's failure to undergo a "Category X" psychological study in making its decision. The board had ordered this study in 1986, but the study administrator refused to do it because of this Court's "obstructionistic" order barring inquiry into the 1976 convictions. Spain was in effect blamed for not having the study done, because he would not talk about the 1976 convictions in light of our Order. Hence, the board's consideration of this as a factor in denying parole is a violation of our Order.

On review of the transcript of the parole hearing, and the arguments of the parties, this Court concludes that, albeit indirectly, the parole board has defied our March 23, 1987, Order. Thus, this Court can invalidate the hearing without inquiring whether the parole board acted arbitrarily or lied about its reasons for denying parole. So, granting this motion is within the limited scope of our federal powers.

Accordingly, the board must give petitioner a new hearing, in strict compliance with our Order not to consider, directly or indirectly, the 1976 conviction or related incidents. That is, the board must base its decision solely on petitioner's 1967 conviction, his juvenile record, and his conduct during incarceration apart from his involvement in those incidents.

If the new hearing contains similarly improper and unjust grounds for denial of parole, this Court will be compelled to conclude that the board cannot provide petitioner with a lawful hearing in compliance with our March 23, 1987, Order, and further relief may then be appropriate.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that the California Board of Prison Terms shall give petitioner Spain a new hearing which complies with this Court's Order of March 23, 1987, within ten days, or else release him.

IT IS SO ORDERED.

DATED: February 3, 1988

ORIGINAL /s/
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

FILED: February 4 7:58 AM '88
WILLIAM L. WHITTAKER, CLERK
U.S. DISTRICT COURT NO. DIST OF CA

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHNNY LARRY SPAIN, Petitioner-Appellee, v. RUTH RUSHEN, Respondent-Appellant.	No. 88-1784 D.C. No. C-81-4858-TEH ORDER

Before: HALL, KOZINSKI and NOONAN, Circuit Judges.

This court denies appellant's petition for rehearing filed December 12, 1989. Judge Noonan dissents from this order.

FILED: February 2, 1990

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS